

GAHC010262032017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/2905/2017

JAMIR UDDIN
S/O LATE ABDUL GAFUR, VILL-MODARTOLI, PS-DOBOKA, DIST. HOJAI,
ASSAM

VERSUS

THE UNION OF INDIA and 5 ORS.
REP. BY THE COMMISSIONER and SECRETARY TO THE GOVT. OF INDIA,
HOME DEPTT., NEW DELHI

2:THE STATE OF ASSAM
REP. BY THE COMMISSINER and SECRETARY TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GUWAHATI-6

3:THE FOREIGNERS' TRIBUNAL

NAGAON COURT NO. 10TH AT SANKARDEV NAGAR
DIST. HOJAI
ASSAM

4:THE DEPUTY COMMISSIONER
HOJAI
PO SANKARDEV NAGAR
DIST. HOJAI
ASSAM

5:THE SUPERINTENDENT OF POLICE B
HOJAI
ASSAM

6:THE OFFICER IN CHARGE

DOBOKA P.S.
P.O-DOBOKA
DIST. HOJAI
ASSA

Advocate for the Petitioner : MD.A J ATIA

Advocate for the Respondent : ASSTT.S.G.I.

BEFORE
HONOURABLE MR. JUSTICE MANASH RANJAN PATHAK
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

ORDER

Date : 23.04.2024
(S.P. Khaund, J)

Heard Mr. A.J. Atia, learned counsel for the petitioner and Mr. G. Sarma, learned Standing Counsel, Home Department, Assam for the respondent Nos. 2, 3, 5 and 6. Also heard Mr. P. Sarma, learned Additional Senior Government Advocate, Assam for the respondent No. 4.

2. The petitioner Md. Jamir Uddin has filed this writ petition under Article 226 of the Constitution of India praying amongst others to set aside and quash the impugned opinion dated 29.11.2016 passed by learned Foreigners Tribunal Nagaon Court No.10th, Sankardev Nagar at Hojai in F.T.(D) Case No. 1606/2016 whereby he was declared as a foreigner under the Foreigners Act, 1946 opining that he had illegally entered in to the territory of India on or after 25.03.1971.

3. It is submitted on behalf of the petitioner that he has a strong case to prove that he is an Indian citizen but the learned Tribunal without considering his written reply and without affording him an opportunity to adduce evidence, declared him as a foreign national of post 25.03.1971 stream.

4. The petitioner is also aggrieved by the order dated 06.04.2017 passed by the learned Tribunal in dismissing the Misc. Case No. 15/2017 that was filed by him in said F.T.(D) Case No. 1606/2016 filed under Section 3(I) of the Foreigners Act, 1946 read with Order IX Rule 13 of the Code of Civil Procedure praying to recall the order dated 29.11.2016 passed by the learned Tribunal in said F.T.(D) Case No. 1606/2016 declaring him as a foreign national.

5. It is submitted by the petitioner that on receipt of notice dated 07.09.2016 of F.T. (D) Case No. 1606/2016 from the Foreigners Tribunal Nagaon Court No.10th he appeared before the said Tribunal on 28.10.2016 along with his engaged counsel and also filed his written reply. It is also submitted that he on 21.11.2016 submitted his written evidence along with relevant documents showing that his father was a *bonafide* Indian citizen, enjoying his constitutional rights during his lifetime and thus he is an Indian citizen by birth. According to the petitioner, the learned Tribunal however did not accept his evidence as it was filed beyond the specified time.

6. It is contended that the learned Tribunal has wrongly observed that neither the petitioner nor his counsel appeared before the Tribunal after filing the Written Statement (WS for short) and passed the order dated 29.11.2016 without taking into consideration of his evidence-in-affidavit that was filed on 22.11.2016, copy of which is annexed to this writ petition as Annexure-XIII. It is further contended by the petitioner that without taking into consideration of his WS and his written evidence-in-affidavit, the learned Tribunal passed the impugned cryptic order dated 29.11.2016, declaring him to be a foreign national.

7. On behalf of the respondents, it is submitted that the learned Tribunal correctly passed the impugned order dated 29.11.2016 as it cannot be disputed that the petitioner submitted his WS without any supporting documents and he

remained absent without any steps. Thus, though considered the case of the petitioner, granted him time, the learned Tribunal after awaiting for considerable period passed the impugned order dated 29.11.2016 as in the absence of supporting documents, a detailed order could not have been passed by the Tribunal.

8. We have considered the submissions made by the parties for the petitioner as well as for the respondents with circumspection.

9. It has been opined by the learned Tribunal that:

A reference was made from the competent authority vide SPs F.T. Case No. 33/2016 which was registered and numbered as F.T.(D) Case No. 1606/2016. Notice was issued and in response, the petitioner appeared before the Tribunal and filed WS without supporting documents. Ample of opportunity was accorded to the petitioner to submit his evidence but the petitioner failed to submit his evidence even after the prescribed time. It was held by the learned Tribunal that the petitioner had willfully neglected to file his evidence either oral or documentary in support of his claim of nationality as a citizen of India. It was held that the petitioner had failed to discharge his burden as mandated under Section 9 of the Foreigners Act, 1946 (The Act of 1946 for short).

10. We have perused the original record of the F.T.(D) Case No. 1606/2016 that was called for from the learned Foreigners Tribunal Nagaon Court No. 10th, Sankardev Nagar, Hojai. We have seen that the petitioner on 28.10.2016 filed his written reply/statement in the said FT case, however, without any documents in support of his case. On our careful scrutiny of said F.T.(D) Case No. 1606/2016, we did not find the written evidence-in-affidavit with documents stated to have been filed by the petitioner under Order XVIII Rule IV of the Code of Civil Procedure, 1908 (CPC for short), photostat copy of which has been annexed to this petition by

the petitioner as Annexure-XIII. It appears from said Annexure-XIII of this writ petition that the petitioner Md. Jamir Uddin Son of Late Abdul Gafur, aged about 38 years, resident of Modertoli, Police Station-Doboka of Hojai District sworn an affidavit under Order XVIII Rule IV of the CPC, his written evidence-in-chief but only the first two pages of it contain the seal and signature of the Notary concerned, signed on 22.11.2016 (Page Nos. 46 & 47 of the Annexure-XIII), but the other two pages of said written evidence-in-chief of the petitioner does not contain the seal and signature of the concerned Notary (Page Nos. 48 & 49 of said Annexure-XIII). On being enquired Mr. A. J. Atia, learned counsel for the petitioner submitted that the petitioner excepting the same did not provide him with its certified copy. On bare perusal of said Annexure-XIII the photostat copy of the affidavit under Order XVIII Rule IV of the Code of Civil Procedure, 1908 written evidence-in-affidavit allegedly filed by the petitioner in said F.T. (D) Case No. 1606/2016 it can be seen that it does not have any signature and date of filing the same before the Tribunal concerned. From the record of said F.T. (D) Case No. 1606/2016 we have rather seen that on 22.11.2016 the learned Tribunal passed the order that though the said date was fixed for filing of evidence of the petitioner, but he remained absent without any step. The order dated 22.11.2016 passed by the Foreigners Tribunal in said F.T. (D) Case No. 1606/2016 is reproduced herein below:

“22.11.2016 The OP is absent today without any step. The case has been fixed today for filing of the evidence of the OP however, the evidence is neither filed today nor any reason is being assigned in support thereof.

In view of the above, the evidence of the OP is therefore closed.

Fixed on 29.11.2016 for passing the final order on merit on consideration of the materials available on record.”

11. It is clear from the order dated 22.11.2016 that as no evidence was submitted by the petitioner, the Tribunal closed his evidence and it fixed the case on 29.11.2016 for final order on merit.

12. However, on perusal of the record of said F.T. (D) Case No. 1606/2016, we have seen that a petition No. 1575/2016 dated 22.11.2016 was filed by the petitioner stating that he could not appear before the Tribunal when his name was called out in its premises, due to some unavoidable circumstances, which led the Tribunal to fix the case for final order against him. The petitioner in the said petition also made a prayer before the learned Tribunal to vacate the said order dated 22.11.2016 by giving him a chance to face the trial of the case for the ends of justice, stating that he will regularly appear before the Tribunal in future without any default.

13. On the body of the said petition filed by the petitioner vide No. 1575/2016 dated 22.11.2016 we have seen that the Tribunal endorsed that – “*Put up on the date fixed*”. However, from the records of the case and order sheets of said F.T. (D) Case No. 1606/2016 we have seen that the Tribunal did not consider the said Petition No. 1575/2016 filed by the petitioner on its previous date i.e., on 22.11.2016 and without passing any order on it, the Tribunal on 29.11.2016 passed the impugned order declaring the petitioner as a foreign national of post 25.03.1971 stream.

14. The impugned order dated on 29.11.2016 passed by the learned Tribunal reveals that it considered the enquiry report by the Enquiry Officer that the petitioner could not produce any valid documents during the course of enquiry and the learned Tribunal in the said order dated 29.11.2016 observed that the same is the reason why the petitioner could not produce any valid documents when he was given sufficient opportunity to adduce evidence and submit relevant documents

and discharge his burden under Section 9 of the Act of 1946.

15. The petitioner has annexed several documents along with the petition to prove his linkage with his father who is an Indian citizen by birth. This Court however, refrains from passing any comments and/or remarks on the annexures submitted in this petition in support of the petitioner's linkage with his father and grandparents, whose names have appeared on the Electoral Roll of 1965, 1966 of No. 91 Samaguri Legislative Assembly Constituency. The petitioner has also submitted that his father's name is recorded in the Electoral Roll of 1970 in the same No. 91 Samaguri LAC as Abdul Gafur Son of Rezak at Sl. No. 106, House No. 38, Block No. 26 of village Bajar under Samaguri Police Station, Mouza Khatowal in the district of Nagaon, Assam and that the names of his grandparents have also appeared in the same Electoral Roll in the Sl. No. 104 and 105. The petitioner has also submitted other documents which according to him will prove that he is a citizen of India by birth.

16. It appears from the record of F.T. (D) Case No. 1606/2016 that the petitioner on 22.11.2016 had indeed filed the petition No. 1575/16, which was to be put up on the next date, but it was not considered by the learned Tribunal on 29.11.2016 despite of its own direction and passed the impugned final order on 29.11.2016 taking the WS of the petitioner into consideration.

17. After giving our thoughtful consideration to the submissions made at the bar, it appears that the petitioner has shown sufficient grounds refuting any willful negligence on his part. The record of F.T. (D) Case No. 1606/2016 reveals that this case was transferred to the learned Tribunal on 07.01.2016 and it was finally disposed of on 29.11.2016, i.e. within a year. The petitioner appeared before the Tribunal on 28.11.2016. He was late in appearing before the Tribunal on 22.11.2016. The petitioner had also filed an application with prayer to vacate the

order of the Tribunal dated 22.11.2016 fixing the matter for final order on 29.11.2016. No willful negligence is discernable on the part of the petitioner.

18. As per Order 3(8) of the Foreigners (Tribunal) Order, 1964 (the 1964 Order for short), a proceedee is to be given only 10 (Ten) days to produce evidence in support of his case. As per Order 3(14) of said 1964 Order, it is also mandated that the Tribunal shall dispose of the case within a period of 60 (Sixty) days on receipt of the reference from the competent authority.

19. The Tribunal thus proceeded to pass the impugned order dated 29.11.2016. It has already been held in the foregoing discussions that the proceeding was disposed of by the Tribunal at a regular pace. No procrastination or pendency of the proceeding could be deciphered from the conduct of the petitioner. It appears that an opportunity can be accorded to the petitioner to present his case before the learned Tribunal.

20. Although the petitioner has submitted a copy of the written evidence-in-affidavit as Annexure-XIII in this petition, which is not found in the original record of the F.T. (D) Case No. 1606/2016, we are of the opinion that for the forgoing discussions the petitioner is entitled for an opportunity to appear before the Tribunal and present his case and submit his evidence-in-affidavit with documents to be relied upon by him as been stated in the Annexure-XIII of this petition that is filed by him.

21. As such the impugned opinion dated 29.11.2016 passed by learned Foreigners Tribunal Nagaon Court No. 10th, Sankardev Nagar at Hojai in F.T.(D) Case No. 1606/2016 as well as the order dated 06.04.2017 passed by the said Tribunal in Misc. Case No. 15/2017 filed in said F.T.(D) Case No. 1606/2016 are set aside and quashed.

22. The petitioner shall now appear before the Foreigners Tribunal Nagaon Court No. 10th, Sankardev Nagar at Hojai in F.T.(D) Case No. 1606/2016 on 10th May, 2024 with a certified copy of this order and on the said date itself he shall file his written Evidence-in-Affidavit in F.T.(D) Case No. 1606/2016 with all those documents that he mentioned in Annexure-XIII to this petition.

23. In the event of appearance and filing of such written Evidence-in-Affidavit in F.T.(D) Case No. 1606/2016 in said F.T.(D) Case No. 1606/2016 by the petitioner as per the direction above the Foreigners Tribunal Nagaon Court No. 10th or the concerned Foreigners Tribunal at Sankardev Nagar, Hojai shall dispose of said F.T.(D) Case No. 1606/2016 as per the Foreigners Act, 1946 and Foreigners (Tribunals) Order, 1964.

24. It is also made clear that failure on the part of the petitioner to comply with the above direction, the concerned Foreigners Tribunal at Sankardev Nagar, Hojai shall be at liberty to dispose of said F.T.(D) Case No. 1606/2016 as per the provisions of said 1946 Act and 1964 Order.

25. Since this order has been passed in presence of the counsel for the petitioner, no fresh notice need be issued to the petitioner by the concerned Foreigners Tribunal at Sankardev Nagar, Hojai in said F.T.(D) Case No. 1606/2016.

26. The interim protection and bail granted to the petitioner earlier by the Court in this proceeding on 19.05.2017 is hereby recalled/stands vacated.

27. The Registry shall forth with return the records of F.T.(D) Case No. 1606/2016 to the Foreigners Tribunal Nagaon Court No. 10th or the concerned Foreigners Tribunal at Sankardev Nagar, Hojai along with a copy of this order as well as copy of Annexure-XIII to this petition, filed by the petitioner.

28. In the above terms this writ petition stands allowed to the extent above. No

order as to costs.

JUDGE

JUDGE

Comparing Assistant